Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

PENNMONT SECURITIES,
Petitioner
v.

MEYER FRUCHER ET AL,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Lynanne B. Wescott
Counsel of Record
The Wescott Law Firm P.C.
239 S. Camac Street
Philadelphia, PA 19107
(215) 545-0324
Lwescott@wescottlaw.net

QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals erred when, contrary to holdings in the Second, Ninth and Eleventh Circuit Courts of Appeals, it failed to consider that the Philadelphia Stock Exchange ("PHLX") had become a for- profit stock exchange and was, as to Petitioner, enforcing internal rules related to its private business activities as opposed to performing quasi governmental functions pursuant to delegated authority, thereby leading to the erroneous finding that the court lacked subject matter jurisdiction because Petitioner failed to exhaust its administrative remedies?

In particular, in order to conclude that an exhaustion of administrative remedies was required, should the Court of Appeals have first determined whether the PHLX was actually performing quasi-governmental regulatory duties delegated to the PHLX pursuant to the Securities Exchange Act ("SEA") or, instead, was pursuing its own for-profit business activities? Three other Courts of Appeals have held that this analysis must be performed on a case by case basis that precludes proceeding as the Third Circuit did. The Third Circuit held that because the acts complained of were denoted by the PHLX as an enforcement of a PHLX rule administrative exhaustion was required. This is problematic when that rule was not enacted pursuant to the formal rulemaking process of the SEA, 15 U.S.C. Section 78s(b)(1 & 2), and instead used language expressly drafted for not-for- profit exchanges wholly outside of its intended setting, i.e.,

in the context of the PHLX's for-profit private business activities.

LIST OF PARTIES TO THE PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

Meyer Frucher
Philadelphia Stock Exchange Board of Governors John Does 1-12
Philadelphia Stock Exchange[1]
National Securities Clearing Corporation

PETITIONER PENNMONT IS A PARTNERSHIP AND THEREFORE CORPORATE DISCLOSURE IS NOT REQUIRED

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[1] Philadelphia Stock Exchange ("PHLX") is now NASDAQ OMX PHLX.

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CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

DATE ORDER DENYING APPEAL ENTERED:
August 17, 2009

DATE ORDER DENYING REHEARING ENTERED: September 17, 2009

STATUTORY PROVISION THAT PROVIDES JURISIDICTION:

28 U.S.C. § 1254

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED:

See Appendix for text of the following:

15 USCS § 78s Registration, responsibilities, and oversight of self-regulatory organizations

15 USCS § 78aa

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title [15 USCS §§ 78a et seq.] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title [15 USCS §§ 78a et seq.] or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title [15 USCS §§ 78a et seq.] or rules and regulations thereunder, or to enjoin any violation of such title [15 USCS §§ 78a et seq.] or rules and regulations, may be brought in any such district or in the district wherein the

defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title [15 USCS §§ 78a et seq.] brought by or against it in the Supreme Court or such other courts.

PHLX Rule 651. Exchange's Costs of Defending Legal Proceedings

Any member, member organization, foreign currency options participant, foreign currency options participant organization, or person associated with any of the foregoing who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members, officers, committee members, employees, or agents, and related to the business of the Exchange, shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding, but only in the event that such expenses exceed $50,000.00. This provision shall not apply to disciplinary actions by the Exchange, to administrative appeals of Exchange actions or in any specific instance where

the Board has granted a waiver of this provision. Adopted. August 5, 2004 (04-47).

14th Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.S. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises from the recent phenomena of not-for-profit stock exchanges demutualizing and becoming for-profit entities. It concerns the enactment and enforcement of exchange rules, more suited to not-for-profit entities, with the aim to dissuade PHLX shareholders who were also members of the exchange, who, at the time of demutualization owned virtually all of the issued PHLX stock, from challenging the activities of its Board of Governors and management.

Pursuant to the 1975 amendments to the Securities Exchange Act ("SEA"), 15 U.S.C. §§ 78a et seq., all proposed rules of self regulatory organizations must be presented to the Securities Exchange Commission ("SEC"). Section 78s(b)(3)(A) permits the making of effective upon filing rules by excepting those rules from the formal rule making process. As of January 2004 the Philadelphia Stock Exchange ("PHLX"), a self regulatory organization under the SEA, became the first stock exchange to operate as a for-profit business through the process of demutualization.

In August 2004 the for-profit Delaware corporation PHLX enacted Rule 651 as an effective upon filing rule. In its filing for Rule 651, PHLX claimed Rule 651 qualified to be an effective upon filing rule because it used language similar to the rules of not-for-profit exchanges that had gone through the SEC formal approval process. Rule 651 requires members to pay to the PHLX the reasonable attorneys' fees and court costs in excess of $50,000

incurred by PHLX when a lawsuit brought by a member of the PHLX against it fails. Petitioner PennMont had sued PHLX beginning in 1998 to enjoin it from merger with the American Stock Exchange, which plan of merger was dropped, and in 2003 for more information about demutualization of PHLX along with allegations of wrongful acts and profiteering by management at the expense of Exchange members. The case was finally resolved in PHLX's favor in 2006 with the Pennsylvania appellate courts finding and affirming preemption of Petitioner's claims.

In 2007, in the first instance of application of Rule 651, PHLX invoiced Petitioner for claimed attorneys' fees and court costs of nearly a million dollars retroactive to 1998 for the case filed by Petitioner. At a deposition on November 2, 2007, PHLX counsel presented a nearly million dollar bill to Petitioner PennMont dated November 1, 2007, which had stamped across it "Do not Remit Payment—Clearing Account Charged at NSCC." Alarmed, PennMont promptly filed on November 4, 2007, an injunction in a case pending against PHLX in federal court, alleging that PHLX had acted outside the authority granted to PHLX by the SEA, the rules and regulations thereunder, and the PHLX's own rules and By-Laws in the actions taken to collect on the questionable invoice.

Subsequently, without a hearing, on a telephone conference on December 26, 2007, the district court dismissed the injunction suggesting a new claim be filed in a separate case. That new claim was filed on December 31, 2007, with a request

for injunction and a separate complaint for money damages for due process violations.

The delay between the initial injunction filing on November 4, 2007 (upon which no hearing was held) and the new injunction and complaint filed on December 31, 2007, allowed a time frame in which PHLX created out of whole cloth, a hearing "process" and a "Special Committee" composed of at least one member who had been sued by PennMont, and held a "telephone hearing" to which PennMont's counsel was not given any call-in number.[1]

Petitioner respectfully submits that at the time of these events, there was no process in place at PHLX to contest the invoice or the sweep of funds from petitioner's trading account nor was there a basis, either under a statute or rule, to request relief from the SEC. It was only after the fact that PHLX created the procedure which now appears to require "administrative exhaustion."

There was no process in place at PHLX to contest the invoice or the sweep of funds from petitioner's trading account nor was there a basis, either under a statute or rule, to request relief from the SEC.

The district court assumed without deciding that it had jurisdiction, but denied the request for injunctive relief holding under Fed. R. Civ. P.

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[1] The appeals court commented on that hearing saying that PHLX had presented a fax confirmation sheet of the notice to PennMont's counsel. However, PennMont counsel's own fax receipt log for that day, which was submitted to the trial court, DOES NOT show any fax from PHLX at the time PHLX claimed it was sent, or at any time. This is in dispute, but does not affect the legal arguments herein.

12(b)(6) that the PHLX had absolute immunity against this claim even though allegations were made of acts outside the "outer scope of official duties." Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985); Barbara v. New York Stock Exchange, 99 F.3d 49 (2d Cir. 1996).

On appeal the Third Circuit Court of Appeals dismissed the case finding it did not have subject matter jurisdiction because Petitioner had not exhausted its administrative remedies after the PHLX hearing, by failing to appeal to the SEC. [2] The appeals court vacated the district court's decision finding that it had no jurisdiction to rule.

However, although PHLX sent a notice of intent to suspend Petitioner during the pendency of the federal appeal, it has been learned that the necessary steps to suspend Petitioner from the PHLX were not taken until September 2009, so technically no appeal to the SEC could be taken until a "final disciplinary sanction" occurred. See 15 U.S.C. § 78s(d).

During the pendency of this case in the federal courts, PHLX for the second time applied Rule 651 against a partner of petitioner for filing an insider trading case against a PHLX Board member for purchasing that partner's stock at a favorable price based on inside information. PHLX appointed a hearing panel, the partner was suspended and

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[2] At argument PHLX counsel indicated that Petitioner could still go to the SEC under a certain set of circumstances. Petitioner has made a request to the SEC for review and respondent has opposed it based on lack of jurisdiction.

subsequently appealed to the SEC. The SEC found that it could review the matter because suspension was a final disciplinary sanction. In re Feinberg, SEA Rel. No. 59577, Admin. Proc. File No. 3-13128 (March 13, 2009). It reversed the PHLX decision against the partner, found PHLX Rule 651 very expansive and found that insider trading was not "related to the business of the exchange" as required by Rule 651, but has not limited the reach of Rule 651 sua sponte. The SEC did not evaluate the not-for-profit/for-profit status of PHLX in coming to its decision.

After oral argument, the Court of Appeals held it had no subject matter jurisdiction because petitioner PennMont failed to exhaust its administrative remedies with the SEC. Because this precedential opinion is contra to the analysis of three other appeals courts, this petition is presented for consideration by the Court.

CONCISE ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT, INCORPORATING SUPREME COURT RULE 10

The issues in this petition are relevant and important because of the recent reformulation of the United States stock exchanges from not-for-profit to for-profit entities with shareholders. This Court has not to date specifically ruled upon the issues presented here. Three appellate courts have ruled, consistently, (two decisions concerned for-profit exchanges), that exchanges do not have immunity for acts inconsistent with delegated authority finding that, before any decision can be made on immunity, a court must decide if the acts engaged in were quasi-governmental and therefore immune. If so, then administrative exhaustion applies. If the acts were those of private enterprise, then a claimant may proceed with suit in court without the necessity of administrative exhaustion. Thus, the Third Circuit has ruled contrary to those courts of appeal who have considered the issue, by not first determining if PHLX's acts are consistent with delegated authority before requiring Petitioner to proceed administratively, a course not available to Petitioner when suit was begun.

A stock exchange is entitled to immunity when acting in its capacity as an SRO when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the SEA and the regulation and rules promulgated thereunder and it must be decided on a case by case basis. However, "[w]hen conducting private business, [an SRO]

remains subject to liability." Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213, 1214 (9th Cir. 1998). SROs effectively "stand [] in the shoes of the SEC" because they perform regulatory functions that would otherwise be performed by the SEC. DL Capital Group v. Nasdaq Stock Market, 409 F.3d 93, 95 (2nd Cir. 2005)(citation omitted)(immunity is determined on a case by case basis). In DL Capital Group the issue was where the line should be drawn between the for-profit Nasdaq's regulatory duties, which are immune from suit, and non-regulatory activities which are not. Entities that enjoy absolute immunity when performing governmental functions cannot claim that immunity when they perform non-governmental functions. See also Weissman v. National Association of Securities Dealers, Inc., 500 F.3d 1293, 1299 (11th Cir. 2007). In Weissman, the court rejected a standard that would grant SROs absolute immunity for all activity merely "consistent with delegated powers." Id. at 1298. "...[B]ecause the law favors providing legal remedy to injured parties, grants of immunity must be narrowly construed; that is, courts must be "careful not to extend the scope of the protection further than its purposes require." Weissman v. National Association of Securities Dealers, Inc., 500 F.3d at 1297, (citing Forrester v. White, 484 U.S. 219, 224 (1988)).

Moreover, the delegated authority that PHLX exercises cannot extend beyond the power granted to the SEC by Congress under the SEA, which does not extend to the exercise of jurisdiction over corporate matters that are corporate state law issues See The

Business Roundtable v. SEC, 905 F.2d 406, 411-412 (D.C. Cir. 1990). The claims brought by Petitioner PennMont were quintessential shareholder claims. PHLX has no immunity, when, as here, it acts as a Delaware corporation, in the conduct of private business and Petitioner should not be obligated to pursue the administrative process to recover on the claims in its complaint filed with the injunction action which predated any purported administrative process by PHLX.

The authorization for the PHLX as a national stock exchange to engage in rule making is pursuant to Section 19 of the Act, 15 U.S.C. 78s. The power to make rules is pursuant to, and constrained by, the SEA itself. If an appropriate basis upon which to enact a rule is not present in the SEA, neither the SEC, nor an SRO like PHLX acting under a delegation of authority from the SEC, can enact that rule. An SRO may not enact a rule in conflict with another law. Rule 651 can be read to supercede state corporate law by imposing legal fees upon a shareholder who did not prevail on a shareholder suit against PHLX, if and only if, that shareholder is also a member of PHLX. Congress explicitly provided that SRO rules could not be inconsistent with state law. The Business Roundtable at 413-414.

The issues in this case clearly lie within the subject matter jurisdiction of the federal courts pursuant to 15 U.S.C. 78s(b)(3)(C) which reads in relevant part:

> (C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this

> paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law.

Wyeth v. Levine, 129 S. Ct. 1187 (2009), addresses the deference to be given to an agency rule in deciding such matters. The SEC itself has taken the position that no deference whatsoever is to be given to effective upon filing rules like Rule 651. Chicago Board Options Exchange, SEC Release 51252 fn 33, 2005 WL 1074831, February 25, 2005, held that effective upon filing rules are subject to de novo review by the court ruling on that rule because the SEC has never issued any approval order finding that the rule change is consistent with the requirements of the SEA. The court of appeals in this case did not so rule, rather requiring administrative exhaustion.

PHLX is, and was at the relevant times, a for-profit Delaware corporation with shareholders, or equity owners, some of whom like PennMont Securities are also members of PHLX. The Act does not provide any authority for the Exchange to engage in rule-making that diminishes, impairs or otherwise constricts the rights of equity owners of the Exchange acting as equity owners or in matters clearly within the province of state corporate law, specifically, corporate shareholder rights, merely because that shareholder is also a member of the PHLX. The legislative history of the SEA expressly reveals that the intent of Congress was not to federalize state corporate law.

On November 2, 2007, Joseph Carapico, general partner of PennMont Securities, petitioner herein, received a bill for $925,612.20 for legal fees "[p]ursuant to Rule 651" with a notation that such fees would be swept [3] from its NSCC account. Petitioner filed for injunctive relief in federal court believing the court had subject matter jurisdiction pursuant to because: a) Rule 651 can only apply to litigation that concerns activities of members engaged in, or related to, stock market activities, ie activities within the domain of the Securities Exchange Act and can not apply to litigation arising from owning stock or holding equity in PHLX; b) while Congress can enact laws that have a retroactive application, even Congress has limits and there is no basis to conclude that a delegation of a delegation of authority (from Congress to the SEC to an SRO) carries with it the power to enact rules having a retroactive effect, particularly when that rule was expressly designated only to take effect upon filing, here to be effective in 2004; and c) as a purported fee-shifting right when PHLX prevails in litigation with a member, the claim for fees must be brought within the relevant litigation as a counter-claim or it is waived.

Significantly, there is no administrative review provided for an application by the PHLX of Rule 651 against a member. It is only when a

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[3] Although PHLX did not sweep PennMont's NSCC account after the injunction was filed, it suspended PennMont from trading on PHLX for failure to pay the challenged debt. PennMont had been a member of PHLX since 1981 and its general partner had been a member since 1968.

member does not pay an invoice issued under Rule 651 and the PHLX then suspends that member that the member can then seek administrative review at the SEC. In other words, a member can seek administrative review of a suspension from membership for a failure to pay an invoice issued under Rule 651 because that is deemed to be a "disciplinary sanction." But there is no administrative review available for the issuing of the invoice itself to the member. The invoice must be listed in the member's books and records as a debt whether it is legitimate or not, constricting the use of its capital for trading. Here, PHLX simply notified Petitioner it was taking the Rule 651 money from its trading account.

Petitioner avers that the Third Circuit Court of Appeals had subject matter jurisdiction of these issues pursuant to 15 U.S.C. 78aa and 15 U.S.C. 78s(b)(3)(C) and that administrative exhaustion was not required.

In Grupo Dataflux v. Atlas Global Group, 541 U.S. 567 (2004) this Court held that the rule for determining subject matter jurisdiction is the time of filing. Here, at the time of filing, federal jurisdiction over the constitutional claims for unlawful acts by a state actor and its CEO, that is PHLX, was proper.

It was those acts outside PHLX authority, not the challenge to the internal Rule 651 or sanction, which had not yet occurred, that caused PennMont to seek injunctive relief from the district court in the first instance. For that reason PennMont believed the federal courts had jurisdiction, and should have retained it.

In Reiter v. Cooper, 507 U.S. 258, 268 (1993), this Court discussed the doctrine of primary jurisdiction, particularly applicable in the case at bar. The doctrine of primary jurisdiction is specifically applicable to claims, properly cognizable in court, that contain some issue within the special competence of an administrative agency, such as the SEC. The doctrine requires the court to enable a referral to the agency, staying further court proceedings to give the parties an opportunity to seek an administrative ruling, however the referral to the agency does not deprive the court of jurisdiction.

The SEC certainly has jurisdiction to review alleged violations by an SRO when the SRO has acted in its regulatory capacity. See 15 U.S.C. § 78s(h)(1)(permitting the SEC to suspend, censure or impose other limits on an SRO for violating the Exchange Act, rules or regulations thereunder, or the SRO's own rules). However, no case holds that the SEC has exclusive jurisdiction over SRO conduct which falls, as here, outside of the SRO's regulatory functions, and is directed towards a shareholder.

The appeals court cited First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 692 (3d Cir.1979) in support of its refusal to allow an exception to administrative exhaustion based on harm to the business. First Jersey had protested NASD disciplinary action against it as harming its business. However, again, NASD was not-for-profit enforcing its quasi-governmental rules. First Jersey Securities v. Bergen, 605 F.2d at 696, permits two exceptions to the general requirement that

administrative remedies be exhausted when "extraordinary circumstances" exist. The exhaustion requirement is not required "1) when the administrative procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when there is a clear and unambiguous statutory or constitutional violation." Petitioner's case clearly met the second test, if not also the first.

An additional matter that was unaddressed is whether Rule 651 gave a claim that had to be raised in the underlying litigation and was therefore barred post-litigation by claim preclusion. The argument that fee-shifting of legal fees and costs can be done post-litigation is on shaky ground. Justice Brennan, concurring in part and dissenting in part in Hensley v. Eckerhart, 461 U.S. 424, 444 (1983), in whose opinion justices Marshall, Blackmun, and Stevens joined, stated that "fee shifting" is really a cause of action:

> Because of this selectivity, statutory attorney's fee remedies such as those created by § 1988 and its analogues bear little resemblance to either common-law attorney's fee rule: the "American Rule," under which the parties bear their own attorney's fees no matter what the outcome of a case, or the "English Rule," under which the losing party, whether plaintiff or defendant, pays the winner's fees. They are far more like new causes of action tied to specific rights than like background procedural rules governing

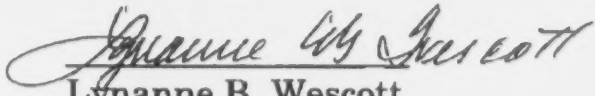
any and all litigation. This fundamental distinction has often been ignored. See ante, at 429; Alyeska Pipeline Co. v. Wilderness Society, 421 U.S., at 247.

In sum, the fee shifting rule enacted by the PHLX was not properly enacted under the SEA, because the effective upon filing methodology used by PHLX, a for-profit entity was not like the prior rules lodged with and approved by the SEC by not-for-profit exchanges, and has been used to curtail challenges to questionable exchange activity by the very people best positioned to halt wrongdoing. This Court should exercise its jurisdiction over this matter because it is a matter of such great public importance.

CONCLUSION

For all these reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be accepted.

Respectfully submitted,



Lynanne B. Wescott
PA Bar ID #52928
The Wescott Law Firm, PC
239 South Camac Street
Philadelphia, PA 19107
215-545-0324
Lwescott@wescottlaw.net

Attorney of Record for
Petitioner

Dated: December 16, 2009

Appendix

PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1476

PENNMONT SECURITIES,
and its partners,
Appellant,

v.

MEYER FRUCHER; PHILADELPHIA STOCK EXCHANGE; PHILADELPHIA STOCK EXCHANGE BOARD OF GOVERNORS, JOHN DOES 1-12; NATIONAL SECURITIES CLEARING CORPORATION

On Appeal from the District Court
for the Eastern District of Pennsylvania

(No. 07-cv-05543)

District Judge: Honorable Anita B. Brody

Argued March 12, 2009

Before: FUENTES, CHAGARES, and TASHIMA,[*]
Circuit Judges

(Opinion Filed: August 17, 2009)

Lynanne B. Wescott, Esq. [ARGUED]
The Wescott Law Firm P.C.
239 S. Camac Street
Philadelphia, PA 19107

Counsel for Appellant

Stephen J. Kastenberg, Esq. [ARGUED] Edward D. Rogers, Esq. Paul Lantieri III, Esq.
Ballard Spahr Andrews & Intersoll, LLP 1735 Market Street, 51st Floor Philadelphia, PA 19103

Counsel for Appellees

FUENTES, Circuit Judge.

This case concerns a dispute between the Philadelphia Stock Exchange ("the Exchange") and PennMont Securities ("PennMont"), a member of the Exchange. PennMont appeals an Order and Opinion

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[*]Honorable A. Wallace Tashima, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

of the District Court, dismissing PennMont's motion for a temporary restraining order ("TRO") and a preliminary injunction on grounds of absolute immunity, and dismissing the entire case for failure to state a claim upon which relief could be granted. For the reasons that follow, we conclude that the District Court was without subject matter jurisdiction to consider any aspect of PennMont's case because of PennMont's failure to exhaust its administrative remedies. Accordingly, we vacate the Order and Opinion of the District Court and remand this case with instructions to dismiss.

The Philadelphia Stock Exchange is a registered national securities exchange. As a registered exchange, it is deemed a self-regulatory organization by the Securities Exchange Act of 1934 ("Exchange Act"). See 15 U.S.C. § 78c(a)(26). Like all similar entities, the Exchange "has a duty to promulgate and enforce rules governing the conduct of its members." See Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 51 (2d Cir. 1996).

In 1998, the Exchange entered into negotiations to sell its assets to the American Stock Exchange ("AMEX"). This sale would have generated more than $100 million for the Exchange, but also would have divested Exchange members of certain governance and equity trading privileges. PennMont Sec. v. Fruscher, 534 F. Supp. 2d 538, 539 (E.D. Pa. 2008). PennMont, a member of the Exchange, vehemently objected to the sale, arguing that it would have drastically devalued PennMont's

ownership stake in the Exchange. PennMont subsequently
brought an action against the Exchange, seeking to enjoin the sale. Although the trial court denied PennMont's injunction, the sale to AMEX fell through while the case was pending.

Several years later, the Exchange's leadership again earned the ire of PennMont. In 2003, the Exchange attempted to alter its corporate structure by converting the Exchange from a non-stock company, with ownership interest measured by seats on the Exchange, to a stock corporation, with ownership interests measured by shares. As with the proposed sale to AMEX, this planned restructuring would have diminished the value of PennMont's ownership stake in the Exchange. PennMont amended its complaint in the previous action to challenge this "demutualization." Again, the trial court denied the injunction. The Appellees subsequently moved for summary judgment, which was ultimately granted by the trial court.

In August 2004, shortly before the trial court ruled on the summary judgment motion, the Exchange passed a fee-shifting provision pursuant to its rule-making authority. The provision in question – Rule 651 – states that

> [a]n y member, member organization, foreign currency options participant, foreign currency options participant organization, or person associated with

> any of the foregoing who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against [the Exchange] or any of its board members, officers, committee members, employees, or agents, and related to the business of [the Exchange], shall pay to [the Exchange] all reasonable expenses, including attorneys' fees, incurred by [the Exchange] in the defense of such proceeding, but only in the event that such expenses exceed $50,000. This provision shall not apply to disciplinary actions by [the Exchange], to administrative appeals of [the Exchange] actions or in any specific instances where the Board has granted a waiver of this provision.

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Legal Fees Incurred by the Exchange, S.E.C. Rel. No. 34-50159, 2004 WL 2049378, at *1 (Aug. 5, 2004). This rule, in sum, would require a member of the Exchange to reimburse the Exchange for its legal fees if the member failed to prevail in a lawsuit it initiated against the Exchange, and the Exchange spent more than $50,000 defending itself.

Approximately one month after the Exchange instituted Rule 651, the Exchange won its summary

judgment motion against PennMont. The decision was affirmed by the Pennsylvania Superior Court in 2006.

In November 2007, more than a year and a half after the Superior Court affirmed the grant of summary judgment, the Exchange invoked Rule 651 and billed PennMont $925,612 for legal fees incurred in defending the lawsuit. This bill included fees incurred well prior to passage of Rule 651. The Exchange stated that it would debit the amount from PennMont's clearing account if PennMont refused to pay.[1] PennMont objected to the invoice and then moved for a TRO and preliminary injunction enjoining the collection of attorneys' fees.

While the District Court considered PennMont's motion, the Exchange's Special Committee to Review Delinquencies and Payments ("Special Committee") reviewed PennMont's objections to the invoice. The Special Committee conducted a telephone hearing that was presided over by three Exchange board members, one of whom was a named party in the 1998 lawsuit. PennMont did not participate in this hearing.[2] Approximately

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[1]Members of the Exchange keep an account with the National Securities Clearing Corporation ("NSCC") to facilitate the collection of fees owed to the Exchange.

[2]PennMont and Appellees disagree as to why PennMont did not participate. PennMont argues that it was never provided with the call-in information necessary to participate in the hearing. Appellees, on the other hand, argue that PennMont was apprised of the necessary information by fax, and offer a fax confirmation sheet

two weeks after the hearing, the Special Committee issued an order and opinion upholding the imposition of attorneys' fees. The Exchange assured the District Court, however, that it would not attempt to collect the funds until the District Court ruled on PennMont's TRO and preliminary injunction.

On February 12, 2008, the District Court denied PennMont's motion for a TRO and preliminary injunction and also dismissed the case for failure to state a claim. Specifically, the District Court noted that: (1) courts have upheld fee shifting provisions mirroring those in Rule 651 time and time again as consistent with the Exchange Act; (2) the Securities and Exchange Commission ("SEC") declared Rule 651 "effective upon filing" and has not attempted to amend or abrogate the rule since; and (3) the Exchange's decision to apply or not apply an internal rule governing the conduct of its members constitutes an exercise of delegated regulatory power and therefore cannot serve as the basis for a private civil suit in a district court. Accordingly, the District Court held that the Exchange had absolute immunity from suit and thus PennMont could not show a likelihood of success on the merits, nor state a claim upon which relief could be granted. The District Court noted, however, that PennMont was not completely without remedies – it could appeal the Special Committee's decision to the SEC, and thereafter appeal the SEC's decision to the Court of Appeals.

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attesting that the relevant contact information was received by PennMont.

II.

A.

We review a denial of a preliminary injunction for an "abuse of discretion, a clear error of law, or a clear mistake on the facts." Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). We review the dismissal of the complaint de novo. Anspach v. City of Philadelphia, 503 F.3d 256, 260 (3d Cir. 2007). We exercise plenary review over questions of subject matter jurisdiction. Lightfoot v. United States, 564 F.3d 625, 626 (3d Cir. 2009).

B.

The District Court decided PennMont's case on the merits, holding that PennMont could not satisfy the requirements of a TRO/preliminary injunction, nor state a claim upon which relief could be granted, because the Exchange was absolutely immune from this lawsuit. PennMont, 534 F. Supp. 2d at 542. The District Court observed that when a self-regulatory organization takes regulatory action consistent with the goals of the Exchange Act, the self-regulatory organization is absolutely immune from private civil suits challenging the regulatory action. Finding that Rule 651 was consistent with the goals of the Exchange Act, the District Court held that the Exchange had absolute immunity from PennMont's lawsuit and thus PennMont could not show a likelihood of success on the merits. In reaching this conclusion, the District Court "assume[d] –

without deciding – that jurisdiction [was] proper." Id. at 540-41. For the reasons that follow, we find that jurisdiction was not proper, and that the District Court should not have addressed the merits of PennMont's claims.

It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). "The primary purpose of this well-established doctrine is the avoidance of premature interruption of the administrative process . . . ." First Jersey Secs., Inc. v. Bergen, 605 F.2d 690, 695 (3d Cir. 1979) (internal citations and quotation marks omitted). "Furthermore, the principle allows the administrative agency to utilize its discretion and apply its expertise; it gives the agency the opportunity to correct its own errors; and it minimizes piecemeal appeals of agency actions." Id.

The Exchange Act provides a comprehensive administrative review procedure applicable to decisions rendered by self-regulatory organizations. Once a self-regulatory organization, such as the Exchange, issues a final ruling, that decision is subject to administrative review by the SEC. 15 U.S.C. § 78s(d)(1)-(2).[3] If an aggrieved party is

[3]The Exchange Act provides for SEC review when any self-regulatory organization imposes any final disciplinary sanction on any member thereof or

dissatisfied with the SEC's determination, it can obtain further review from the United States Court of Appeals for the circuit in which the aggrieved party resides. 15 U.S.C. § 78y(a)(1).[4] We have endorsed the requirement that litigants exhaust this specific administrative remedy provided by the Exchange Act, emphasizing that "it is essential that courts refrain from interfering with the process unnecessarily." First Jersey, 605 F.2d at 696.

PennMont did not avail itself of this administrative process. Rather, once the Exchange sought to enforce Rule 651, the fee-shifting rule,

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> participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member
>
> . . . .

15 U.S.C. §§ 78s(d)(1)-(2).

[4] Pursuant to the Exchange Act,

> [a] person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

15 U.S.C. § 78y(a)(1).

PennMont decided not to seek SEC review and went straight to the District Court to request an injunction.

Typically, when a litigant refuses to exhaust the available administrative remedies provided by the Exchange Act, a district court may not exercise jurisdiction over the case. Id. at 696 (observing that "the doctrine of exhaustion of administrative remedies applies with equal force to the disciplinary proceedings" of a self-regulatory organization). We have, however, laid out two "extraordinary" exceptions to the exhaustion requirement, either of which would compel a court to hear an unexhausted case: "1) when the administrative procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when there is a clear and unambiguous statutory or constitutional violation." Id. For the reasons that follow, however, PennMont cannot demonstrate the "extraordinary circumstances" necessary to satisfy either exception.

PennMont's only basis for alleging irreparable harm sufficient to satisfy the first exception relates to the threat that Rule 651, the fee-shifting rule, poses to the financial health of its business operations. In First Jersey, however, we noted that claims of corporate financial collapse cannot satisfy the irreparable harm exception, given that financial harm can occur in many, if not most, disciplinary hearings of securities traders. Id. at 697. As we previously observed, "[a]ny company threatened by [a self-regulatory organization] hearing could run into district court claiming that the imposition of

sanctions would result in irreparable injury." Id. Without more, PennMont cannot satisfy the first exception.

Nor can PennMont demonstrate the sort of "clear and unambiguous" statutory or constitutional injury that would satisfy the second exception. As pointed out by the District Court, regulations similar to Rule 651 have been consistently approved by the SEC. See, e.g., Order Granting Approval to Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to the Liability of the Exchange and its Governors, Officers and Agents, S.E.C. Release No. 37563, 62 S.E.C. Docket 1527, 1996 WL 466637 (Aug. 14, 1996) ("Pacific Stock Exchange Rule"). The Pacific Stock Exchange Rule – which contains an attorney fee provision largely identical to Rule 651 – applies to "a member or associated person who fails to prevail in a lawsuit or other legal proceeding instituted by that person against the Exchange or other specified persons, and related to the business of the Exchange . . . ." Id. The SEC found that this rule was consistent with the Pacific Stock Exchange's mandate under the Exchange Act to craft rules "provid[ing] for the equitable allocation of reasonable dues, fees, and other charges among its members . . . ." Id. (citing 15 U.S.C. § 78f(b)(4)). The Commission further noted that because the obligation to pay attorneys' fees would only be triggered once the fees climb above $50,000, "the rule change should not provide an undue disincentive to litigation, in so far as it will permit the discovery needed to assess the merits of the members' cases." Id. Although

PennMont's argument regarding the Exchange's retroactive application of Rule 651 would not be foreclosed by the SEC's prior approval of similar rules, the consistent endorsement of these rules by the SEC surely complicates PennMont's ability to demonstrate a "clear and unambiguous" violation of statutory or constitutional law.

In our view, the lawfulness of the Exchange's conduct is far from clear and unambiguous. Moreover, this is precisely the sort of question that would have benefited from administrative review: we would be far better positioned to consider the propriety of the application of Rule 651 had PennMont given the SEC the opportunity to apply its expertise to this matter in the first place. See First Jersey, 605 F.2d at 696 (noting that the structure of administrative review enables the SEC to "apply its expertise" and, if necessary, "correct its own errors without resort to the courts"). Accordingly, PennMont also fails to satisfy the second exception to the administrative exhaustion requirement.

III.

Because PennMont has failed to administratively exhaust its challenge to the application of Rule 651, we dismiss this appeal for lack of subject matter jurisdiction and remand to the District Court with instructions to vacate its order and to dismiss this action for lack of subject matter jurisdiction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1476

PENNMONT SECURITIES,
and its partners

Appellant,

v.

MEYER FRUCHER; PHILADELPHIA STOCK EXCHANGE; PHILADELPHIA STOCK EXCHANGE BOARD OF GOVERNORS, JOHN DOES 1-12; NATIONAL SECURITIES CLEARING CORPORATION

On Appeal from the District Court
for the Eastern District of Pennsylvania
(No. 07-cv-05543)
District Judge: Honorable Anita B. Brody
Argued March 12, 2009

Before: FUENTES, CHAGARES, and TASHIMA,*
Circuit Judges

*Honorable A. Wallace Tashima, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 12, 2009.

On consideration thereof, it is now hereby

ORDERED and ADJUDGED that the order of the District Court entered on February 12, 2008 is VACATED and the case is REMANDED with instructions to dismiss for lack of subject matter jurisdiction.

All of the above in accordance with the opinion of this Court. Costs are taxed against Appellant.

ATTEST:

/s/Marcia M Waldron,
Clerk

DATED: August 17, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1476

PENNMONT SECURITIES,

Appellant,

v.

MEYER FRUCHER; PHILADELPHIA STOCK EXCHANGE; PHILADELPHIA STOCK EXCHANGE BOARD OF GOVERNORS, JOHN DOES 1-12; and NATIONAL SECURITIES CLEARING CORPORATION,

Appellees.

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN and

TASHIMA,[□] Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: September 17, 2009
MB/cc: Lynanne B. Wescott, Esq.
Stephen J. Kastenberg, Esq.
Paul Lantieri, III, Esq.

[□]Honorable A. Wallace Tashima, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

§ 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies.

(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 6, 15A, or 17A of this title [15 USCS § 78f, 78o-3, or 78q-1], respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such

extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this title [15 USCS §§ 78a et seq.] and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency--

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the

date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in

its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b) Proposed rule changes; notice; proceedings.

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed

rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall--

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title [15 USCS §§ 78a et seq.] and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such

finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3) (A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-

regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title [15 USCS §§ 78a et seq.], the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.]. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title [15 USCS § 78y] nor deemed to be "final agency action" for purposes of section 704 of title 5, United States Code [5 USCS § 704].

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency--

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the

custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D) The Commission shall abrogate any change in the rules of such a clearing agency made by a proposed rule change which has taken effect pursuant to paragraph (3) of this subsection, require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection, and reviewed in accordance with the provisions of paragraph (2) of this subsection, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of filing of such proposed rule change of such appropriate regulatory agency's (i) determination that the rules of such clearing agency as so changed may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(5) The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor. If the Secretary of the Treasury comments in writing to the Commission on a

proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6) In approving rules described in paragraph (5), the Commission shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(7) Security futures product rule changes.

(A) Filing required. A self-regulatory organization that is an exchange registered with the Commission pursuant to section 6(g) of this title [15 USCS § 78f(g)] or that is a national securities association registered pursuant to section 15A(k) of this title [15 USCS § 78o-3(k)] shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule change or any proposed change in, addition to, or deletion from

the rules of such self-regulatory organization (hereinafter in this paragraph collectively referred to as a "proposed rule change") that relates to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for security futures products for persons who effect transactions in security futures products, or rules effectuating such self-regulatory organization's obligation to enforce the securities laws. Such proposed rule change shall be accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, promptly publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit data, views, and arguments concerning such proposed rule change.

(B) Filing with CFTC. A proposed rule change filed with the Commission pursuant to subparagraph (A) shall be filed concurrently with the Commodity Futures Trading Commission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 5c(c) of the Commodity Exchange Act [7 USCS § 7a-2(c)], upon a determination by the Commodity Futures Trading Commission that review of the proposed rule change is not necessary, or upon approval of the proposed rule

change by the Commodity Futures Trading Commission.

(C) Abrogation of rule changes. Any proposed rule change of a self-regulatory organization that has taken effect pursuant to subparagraph (B) may be enforced by such self-regulatory organization to the extent such rule is not inconsistent with the provisions of this title [15 USCS §§ 78a et seq.], the rules and regulations thereunder, and applicable Federal law. At any time within 60 days of the date of the filing of a written certification with the Commodity Futures Trading Commission under section 5c(c) of the Commodity Exchange Act [7 USCS § 7a-2(c)], the date the Commodity Futures Trading Commission determines that review of such proposed rule change is not necessary, or the date the Commodity Futures Trading Commission approves such proposed rule change, the Commission, after consultation with the Commodity Futures Trading Commission, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1), if it appears to the Commission that such proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title [15 USCS

§ 78y] nor deemed to be a final agency action for purposes of section 704 of title 5, United States Code.

(D) Review of resubmitted abrogated rules.

(i) Proceedings. Within 35 days of the date of publication of notice of the filing of a proposed rule change that is abrogated in accordance with subparagraph (C) and refiled in accordance with paragraph (1), or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall--

(I) by order approve such proposed rule change; or

(II) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved. Proceedings under subclause (II) shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within 180 days after the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings, the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

(ii) Grounds for approval. The Commission shall approve a proposed rule change of a self-regulatory organization under this subparagraph if the Commission finds that such proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The Commission shall disapprove such a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(8) Decimal pricing. Not later than 9 months after the date on which trading in any security futures product commences under this title [15 USCS §§ 78a et seq.], all self-regulatory organizations listing or trading security futures products shall file proposed rule changes necessary to implement decimal pricing of security futures products. The Commission may not require such rules to contain equal minimum increments in such decimal pricing.

(9) Consultation with CFTC.

(A) Consultation required. The Commission shall consult with and consider the views of the Commodity Futures Trading Commission prior to approving or disapproving a proposed rule change filed by a national securities association registered pursuant to section 15A(a) [15 USCS §

78o-3(a)] or a national securities exchange subject to the provisions of subsection (a) that primarily concerns conduct related to transactions in security futures products, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(B) Responses to CFTC comments and findings. If the Commodity Futures Trading Commission comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving or disapproving the proposed rule. If the Commodity Futures Trading Commission determines, and notifies the Commission, that such rule, if implemented or as applied, would--

(i) adversely affect the liquidity or efficiency of the market for security futures products; or

(ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section,

the Commission shall, prior to approving or disapproving the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(c) Amendment by Commission of rules of self-regulatory organizations. The Commission, by rule, may abrogate, add to, and delete from

(hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title [15 USCS §§ 78a et seq.] and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-

regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4) (A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5, United States Code [5 USCS § 553], for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this title [15 USCS §§ 78a et seq.].

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this title [15 USCS §§ 78a et seq.] to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5), the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure.

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title [15 USCS §§ 78a et seq.].

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by

any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 6(g) of this title [15 USCS § 78f(g)] or a national securities association registered pursuant to section 15A(k) of this title [15 USCS § 78o-3(k)] only to the extent that such exchange or association imposes any final disciplinary sanction for--

(A) a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under section 19 of this title [this section], except that, to the extent that the exchange or association rule violation relates

to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction.

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title [15 USCS §§ 78a et seq.], the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions

are, and were applied in a manner, consistent with the purposes of this title [15 USCS §§ 78a et seq.], such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title [15 USCS §§ 78a et seq.] or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding. In any proceeding to review the denial of membership or participation in a self-regulatory organization to

any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this title [15 USCS §§ 78a et seq.], such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member,

or grant such person access to services offered by the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations.

(1) Every self-regulatory organization shall comply with the provisions of this title [15 USCS §§ 78a et seq.], the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 17(d) of this title [15 USCS § 78q(d)], paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance--

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this title [15 USCS §§ 78a et seq.], may relieve any self-regulatory organization of any responsibility under this title [15 USCS §§ 78a et seq.] to enforce compliance with any specified provision of this title [15 USCS §§ 78a et seq.] or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of

such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions.

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this title [15 USCS §§ 78a et seq.], the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities

Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 15(b)(4) of this title [15 USCS § 78o(b)(4)] or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933 [15 USCS §§ 77a et seq.], in the Investment Advisers Act of 1940 [15 USCS §§ 80b-1 et seq.], the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], this title [15 USCS §§ 78a et seq.], or the rules or regulations under any of such statutes;

(B) in the case of a registered securities

association, any provision of the Securities Act of 1933 [15 USCS §§ 77a et seq.], the Investment Advisers Act of 1940 [15 USCS §§ 80b-1 et seq.], the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], this title [15 USCS §§ 78a et seq.], the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 15(b)(6) [15 USCS § 78o(b)(6)] or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933 [15 USCS §§ 77a et seq.], the Investment

Advisers Act of 1940 [15 USCS §§ 80b-1 et seq.], the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], this title [15 USCS §§ 78a et seq.], or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933 [15 USCS §§ 77a et seq.], the Investment Advisers Act of 1940 [15 USCS §§ 80b-1 et seq.], the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], this title [15 USCS §§ 78a et seq.], the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title [15 USCS §§ 78a et seq.], to remove from office or censure any officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such officer or director has willfully violated any provision of this title [15 USCS §§ 78a et seq.], the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by any

member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) Appointment of trustee. If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 21(d) or 27 of this title [15 USCS § 78u(d) or 78aa] for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.